Order P06-06

TSATSU SHORES HOMEOWNERS CORPORATION

David Loukidelis, Information and Privacy Commissioner
December 21, 2006

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Summary: The organization was authorized to collect, use and disclose employee personal information without consent in most respects complained of here, but failed to give notice that it was doing so as required by PIPA. It also disclosed personal information contrary to PIPA in relation to some disclosures, failed to make reasonable security arrangements to protect personal information and failed to make a reasonable effort to assist the complainants as applicants. It did not fail to make a reasonable effort to ensure the completeness of personal information that it collected. Nor did it fail to retain personal information as required by PIPA. In view of the timing and nature of the organization's failures to comply with PIPA, and the organization's ongoing efforts to comply with PIPA, no legitimate purpose would be served by making any orders.

Key Words: personal information—employee personal information—reasonable security arrangements—retention.

Statutes Considered: *Personal Information Protection Act*, ss. 13, 18, 19, 24, 28, 33, 34 and 35.

Authorities Considered: B.C.: Order P06-04, [2006] B.C.I.P.C.D. No. 35.

1.0 INTRODUCTION

[1] The complainants, who are former employees of the organization, Tsatsu Shores Homeowners Corporation, made a request under the *Personal*

Information Protection Act ("PIPA") for access to their personal information.[1] They also complained to the organization about its actions in relation to their personal information. The complainants later wrote to this Office and made several complaints about the organization.

[2] They say the organization inappropriately collected employee personal information consisting of letters about them sent by residents and non-residents to the organization's board of directors.

[3] The complainants also alleged that the organization inappropriately disclosed their personal information when it posted notices dated August 13, 2004 and September 27, 2004 on its website and in the condominium building, where the information was visible to all residents and visitors. The complainants also complained that the organization's board disclosed their personal and employee personal information in the minutes of several board meetings. Last, the complainants alleged that the spouse of one of the organization's directors had gained unauthorized access to their personal information through her husband.

[4] In their letters to the organization, the complainants had sought correction of their performance evaluation, of a statement in the April 20, 2004 board minutes about their performance evaluation and of their personal information in the notices dated August 13 and September 27, 2004. The organization responded that it had annotated the performance evaluation with the complainants' comments, would discuss amending the April 20, 2004 board meeting minutes at the next board meeting and would not correct or annotate the posted notices of August 13 and September 27, 2004. The organization later wrote to the complainants, however, saying it had annotated the notices of August 13 and September 27, 2004 with the complainant's comments. The organization also indicated that at the March 15, 2005 board meeting, the April 20, 2004 meeting minutes were amended to address the complainants' concerns.

[5] In response, the complainants alleged in their complaint to this Office that the organization's initial refusal to correct or annotate the August 13 and September 27, 2004 notices breached its duty under s. 28 of PIPA to respond appropriately to their correction requests. They also allege that the employee personal information that the organization used in completing their employment performance evaluation was not accurate and complete.

[6] The organization had stored the complainants' original job application in an unlocked filing cabinet in a locked room (at least once, left unlocked, according to the complainants) and, after the complaint, it removed all personal

[1] The organization is a company incorporated under the British Columbia *Company Act*. According to the organization, it is run on a not-for-profit basis and functions like a condominium corporation in running the 87-unit Tsatsu Shores condominium development.

information from the cabinet and destroyed the information. Accordingly, the complainants say, the organization failed to retain personal information that it had used to make a decision directly affecting them for the one-year period required by s. 35 of PIPA.

2.0 ISSUES

[7] These are the issues in this inquiry:

1. Did the organization comply with ss. 13, 18 and 19 of PIPA in collecting, using and disclosing personal information or employee personal information without consent?

2. Did the organization fail to correct or annotate personal information and employee personal information as required by s. 24?

3. Did the organization fail to make a reasonable effort to assist the complainants as required by s. 28?

4. Did the organization fail to make a reasonable effort to ensure that the personal information it collected was accurate and complete as required by s. 33?

5. Did the organization fail to make reasonable security arrangements as required by s. 34?

6. Did the organization fail to retain the complainants' personal and employee personal information as required by s. 35(1)?

[8] The complainants had originally complained about the organization's alleged failure to provide them with a copy of its policies and procedures for PIPA, which s. 5 requires it to have. This is not in issue here, but I will note that the organization in its initial submission acknowledges that its refusal to provide the complainants with this information was not appropriate.

3.0 DISCUSSION

[9] **3.1 Collection and Use of Employee Personal Information**—The complainants say that, when the organization hired them in the latter part of 2003, it did not inform them that it would be collecting, using and disclosing complaints from residents about the complainants' job performance to make decisions about the complainants.[2] They say the organization had every

[2] Page 2, initial submission.

opportunity to "ask for our consent or to notify us" of this before the fact.[3] They also contend that the collection and use of their personal information was not "reasonably required" as contemplated by the employee personal information definition of PIPA; they say the information might only "have been marginally helpful" for employment-related purposes.[4] While they acknowledge that collection of information from customers about an employee's performance may be appropriate in some cases, this is not one of these situations.[5] They rely on an internet publication by a law firm in which the firm expresses the opinion that an employer should not terminate someone's employment based on "an unsubstantiated allegation" without conducting some neutral investigation or inquiry.[6]

[10] For its part, the organization acknowledges, in a general way, that "we understand there were some things we did not handle correctly and we have subsequently made some changes to correct those areas to avoid problems" in the future.[7] As for collection, use and disclosure of the complainants' personal information, the organization says that residents wrote to the organization's board to "either commend or complain" about the complainants. The organization had had some verbal complaints about the complainants and told those residents who complained verbally to put their concerns in writing. The organization did not, however, solicit complaints.[8] The complainants say, in reply, that one of the organization's directors told them that it was his job to solicit complaints and use the information obtained from residents.[9]

[11] PIPA permits an organization to collect, use and disclose "employee personal information" without the consent of the individual in certain circumstances. I discussed PIPA's definition of "employee personal information" at some length in Order P06-04,[10] including by setting the elements of that definition:

> [38] To qualify as "employee personal information":
>
> 1. The information must be "personal information", *i.e.*, "information about an identifiable individual",
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> 2. The personal information must be collected, used or disclosed "for the purposes reasonably required" to establish, manage or terminate an employment relationship,

[3] Page 3, initial submission.
[4] Page 4, initial submission.
[5] Page 4, initial submission.
[6] Page 5, initial submission.
[7] Page 14, initial submission.
[8] Pages 2 and 3, initial submission.
[9] Page 1, reply submission.
[10] [2006] B.C.I.P.C.D. No. 35.

3. The personal information must be collected "solely" for those purposes, and

4. The personal information must not be "personal information that is not about an individual's employment".

[12] The organization has produced letters that it received about the complainants' job performance. The opinions expressed in them about the complainants clearly meet the first part of the employee personal information definition; the opinions qualify as information about identifiable individuals. Jumping to the third element of the definition, there is no suggestion in the material that the personal information was collected for purposes other than the employment relationship. Nor is there any basis for concluding, as contemplated by the fourth part of the test, that the personal information is not about an individual's employment.

[13] The second aspect of the test is at the centre of the complainants' concerns. As indicated in Order P06-04, the statutory standard of what is "reasonably required" is to be interpreted in light of PIPA's purposes, set out in s. 2. Further, an employment relationship does not have

> [46] …free rein to assert that a purpose it cites for collecting, using or disclosing personal information is "reasonably" required to establish, manage or terminate an employment relationship. Section 4(1) provides that, in meeting its responsibilities under PIPA, an organization "must consider what a reasonable person would consider appropriate in the circumstances". More directly, PIPA's definition of employee personal information, by using the words "reasonably required", itself limits the purposes for which an employer may collect, use or disclose personal information in the employment relationship context.
>
> [47] The circumstances of each case, which must be assessed objectively, will govern. Any number of considerations may be relevant in assessing whether an employer's purposes in collecting, disclosing and using personal information are "purposes reasonably required". These may include the nature of the employment relationship itself (as in this case) or factors such as statutory requirements or benefits that may be available to the employer.

[14] The question arises whether an organization can, where its employees' duties involve interacting with customers or clients of the organization, receive complaints or commendations about the job performance of individual employees. If a customer is pleased with how an employee addressed the customer's needs and writes a letter of commendation to the employer, is the employer within its rights to put the letter on the employee's file without having obtained the employee's consent? Can the employer later use that information, without the employee's consent, to give the employee a performance bonus?

Is the answer the same if the customer complains about the employee and the information is kept on file and used to discipline the employee?

[15] I am persuaded that, in this case, PIPA authorized the organization to collect and use information that it received—whether solicited or unsolicited—about the complainants' job performance without consent of the complainants. Information about how well the complainants were performing their tasks, and information about specific concerns regarding performance, is personal information "reasonably required" within the meaning of PIPA's definition of "employee personal information". Further, the collection and use of this employee personal information was, as required by ss. 13(1)(b) and 16(1)(b) of PIPA, "reasonable for the purposes of…managing" the employment relationship.

[16] This is not to say that an employer would necessarily be on safe ground in retaining information that it received or obtained about the behaviour or actions of an employee that, on any reasonable analysis, had nothing to do with the employee's performance of his or her employment duties. An employer would, for example, be pressed to justify under PIPA its collection or retention—much less use—of information that a particular employee belonged to a particular mainstream political party.

[17] Nor does my finding that PIPA authorized the organization to collect the complainants' employee personal information without consent suggest that an employer is at liberty to act on such information in disciplining an employee or terminating her or his employment without falling afoul of other laws or rules. Whether complaints about an employee's performance suffice to establish cause for discipline or termination is another matter entirely and arises outside of PIPA.[11]

[18] **3.2 Disclosure of Employee Personal Information**—There is no dispute that the organization disclosed personal information of the complainants. The disclosures included information about the health of one of the complainants, about a worker's compensation matter involving one of the complainants and performance-related information.

[19] Personal information qualifies as "employee personal information" only if it is, in this instance, "disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship". Further, s. 18(2)(b) of PIPA authorizes disclosure of employee personal information only if the disclosure is "reasonable for the purposes of establishing, managing or terminating an employment relationship".

[20] The complainants say the organization inappropriately disclosed their personal information in the minutes of board meetings. The organization

[11] This is clearly the thinking behind the law firm publication on which the complainants rely.

acknowledges that minutes of a number of meetings refer to the complainants and contain their personal information. It is one thing for the minutes of a meeting of a board of directors to contain personal information for which the directors have a reasonable need to know and another for those minutes to be made available to residents and others. Disclosure of personal information in this way can fall afoul of PIPA's definition of employee personal information and of s. 19(2)(b).

[21] In this case, a number of the meeting minutes disclose personal information of the complainants where there is no basis for concluding that the disclosure was covered under the definition of employee personal information or s. 19(2)(b). The organization acknowledges this[12] and says it is now "striving to do everything correctly".

[22] Subject to any statutory or other rules about the holding of meetings and publication of meeting minutes, it seems to me this organization should consider discussing personal information of employees and residents in private, with minutes of the private portions not being made generally available. For a strata corporation council under the *Strata Property Act*, I note that s. 17(4)(c) of the standard bylaws under that Act provides for the council to meet in private "if the presence of observers would, in the council's opinion, unreasonably interfere with an individual's privacy." Section 19 of the standard bylaws requires the council to "inform owners of the minutes of all council meetings within 2 weeks of the meeting, whether or not the minutes have been approved", but I doubt this requires the council to, despite s. 17(4)(c), disclose employee personal information or personal information discussed in private through the minutes.

[23] As for the August 13, 2004 posting of the complainants' personal information in the building's underground elevator lobby and on the organization's password-protected website, I find that this was not for a purpose reasonably required to manage an employment relationship. Nor was it, as required by s. 19(2)(b), reasonable for the purpose of managing an employment relationship". The organization acknowledges this and says it has apologized to the complainants.[13]

[24] The September 27, 2004 notice is a different matter. The complainants say that disclosure of personal information in this notice, which was posted in the building, was improper and was, like the August 13, 2004 disclosure, "derogatory and shed us [*sic*] in a very unfavourable light". I disagree.

[25] The only paragraph dealing with the complainants reads as follows:

> At the request of …[name of one of the complainants], the Board has removed the resident keys from his possession, as he did not want the

[12] Page 5, initial submission.
[13] Page 4, initial submission.

> responsibility and with his limited work schedule he is not always available to provide this service in the case of an emergency, which was the original purpose.

[26] The rest of this notice contains no personal information of the complainants. As for the information just quoted, it is to say the least innocuous. I find without hesitation that such personal information as was found in the notice was employee personal information and its disclosure without consent was authorized under s. 19(2)(b).

[27] The last ground of complaint is the alleged disclosure to the spouse of one of the organization's directors of emails containing personal information of the complainants. The complainants acknowledge they "have no evidence" to support their allegation, but say that the director's spouse "admitted" that she had seen emails containing personal information. The organization says the board member denies this. In view of the conflicting evidence, I am not prepared to find that disclosure occurred in this manner. As will be seen below, even if such a disclosure had occurred, I would not make any order in that respect.

[28] **3.3 Notice of Collection, Use and Disclosure**—The complainants also say that the organization failed to notify them that it would be collecting, disclosing and using their employee personal information before it did these things. Sections 13(3), 16(3) and 19(3), respectively, require an organization to notify an individual that it will be collecting, using or disclosing employee personal information about the individual and the purposes for doing so before the organization collects the employee personal information without the consent of the individual. The organization's submissions do not address this requirement.

[29] The material before me indicates that the organization hired the complainants effective January 1, 2004, the same day PIPA came into force. Accordingly, the organization was required to notify the complainants about collection, use and disclosure of their employee personal information unless otherwise exempted from that duty under PIPA. It is clear that, during 2004, the organization collected, used and disclosed employee personal information of the complainants. There is no suggestion that the organization was exempted from this duty under PIPA. [14] Accordingly, the organization was obliged to give notice as provided in ss. 13(3), 16(3) and 19(3) and its failure to do so was contrary to PIPA.

[30] **3.4 Reasonable Effort to Assist the Complainants**—The complainants say that the organization's initial response to their request for correction or annotation of their personal information violated the organization's s. 28 duty to make a reasonable effort to assist them as applicants, including in relation to their request for correction of personal information. The organization

[14] There is no suggestion in the material before me that the exceptions to the notice requirement found in ss. 13(4), 16(4) and 19(4) applied.

originally told the complainants that it would "do nothing in regards to" their request for correction or annotation of the August 13 and September 24, 2004 notices. This, they say, was a "conscious, deliberate decision" and thus failed to meet the s. 28 standard.[15]

[31] As noted earlier, the organization later changed its position and annotated the notices with the corrections the complainants had sought. The complainants asked for the corrections on February 21, 2005. In light of the nature and extent of the requested corrections, the organization's initial refusal to act on the request, or to even annotate the records with the requested corrections, clearly fell below the "reasonable effort" standard. I find that the organization did not comply with its s. 28 duty to assist the complainants.

[32] The organization's initial refusal to even annotate the relevant documents with the complainant's requested corrections was also, as the organization now acknowledges, contrary to s. 24 of PIPA. The organization has, again, since corrected this by annotating the documents.

[33] **3.5 Accurate and Complete Personal Information**—Under s. 33, an organization must "make a reasonable effort to ensure that personal information collected by or on behalf" of the organization "is accurate and complete". This duty applies only if the personal information "is likely to be used by the organization to make a decision that affects the individual" or "is likely to be disclosed" to another organization.

[34] The complainants believe the organization did not meet this standard because they asked the organization to "complete our performance evaluation" but, although it had "every opportunity to do so", it failed to do so and thus did not make a reasonable effort to ensure that their personal information was "complete".[16] The organization does not address this aspect of the complainants' submissions.

[35] Section 33 speaks to the completeness of personal information that an organization has collected. It imposes an obligation to make a reasonable effort to ensure completeness, not a duty of perfection, where the organization is likely to use that information to make a decision or to disclose it. The organization must make a reasonable effort to ensure that the personal information in the evaluation is complete, but s. 33 does not require it to complete the job performance evaluation in the manner that the complainants suggest. I decline to find that the organization failed to comply with s. 33 respecting the performance evaluation. I make the same finding respecting the contents of the August 13 and September 27, 2004 notices.

[15] Page 8, initial submission.
[16] Pages 7 & 8, initial submission.

[36] **3.6 Reasonable Security Arrangements**—Section 34 of PIPA requires organizations to protect personal information "by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks." The complainants' concern about the security of their personal information centres on their allegation that on at least one occasion, it was stored in an unlocked filing cabinet in a room that was unlocked "for a period of at least 24 hours".[17]

[37] The organization says the door in question "automatically closes and locks" and appears to suggest that, if it was left unlocked at any time, it was the fault of one of the complainants.[18] More directly, the organization says that the complainants' "complete personnel file" is in the files of its treasurer at home or at her workplace, "[a]ll of which are [in] locked cabinets."[19] The organization says there is an unlocked filing cabinet in a locked room in the basement of the building. The organization's treasurer, on learning of the complaint by the complainants, went through this cabinet and found one copy of the complainants' resumes there. This copy was removed and destroyed.[20]

[38] Of course, even reasonable security arrangements cannot guarantee that personal information will be safe from unauthorized access and other risks mentioned in s. 34. I am not prepared to say anything general about whether organizations must, in all cases, secure employee personal information in any particular way. It is undoubtedly good practice to keep employees' personnel files securely locked up or stored in secure computer systems, but there may be considerations affecting the security of other kinds of employee personal information.

[39] On balance, I have decided that the measures the organization employed for the complainants' resumes were not adequate under s. 34. It was not reasonable to place their personal information in an unlocked filing cabinet in a basement room with ready access to any number of individuals, regardless of whether that room was locked. There is no indication that the room, once locked—and I accept that it was left unlocked at some point—was accessible by only a restricted number of organization directors or employees. I find that the organization did not meet the standard contemplated by s. 34.

[40] **3.7 Retention of Personal Information**—Section 35(1) provides that if an organization uses personal information (including employee personal information) to make a decision that directly affects an individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

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[17] Pages 7 & 10, initial submission.
[18] Page 4, reply submission.
[19] Page 9, initial submission.
[20] Page 10, initial submission.

[41] According to the complainants, emails to and from individual directors contained their employee personal information and the organization's denial that it has these in its possession means it has failed to retain their employee personal information as s. 35 requires.[21] The complainants have provided an example of one of these emails.

[42] The organization says that it has already provided all other emails or communications, other than those pertaining to work (about things that needed to be done around the building, work schedule and so on). The organization says these were all "part of the day to day work product and have long since been disposed of or deleted".[22]

[43] I decline to find on the basis of the material before me that the organization breached its s. 35(1) obligation.

4.0 CONCLUSION

[44] I have found, as discussed above, that the organization complied with PIPA in some but not all respects. The organization's failure to comply with PIPA occurred during the first year or so of PIPA's existence. The organization has candidly admitted its errors and says that, as a volunteer-run organization, it is trying to do things correctly now. As with all laws, PIPA must be obeyed, but in view of the nature of the transgressions (including the fact that they are not ongoing), their timing and the organization's ongoing efforts to comply with PIPA, I consider that no legitimate purpose would be served by making any orders confirming the organization's actions, where they complied with PIPA, or against the organization, where its actions were not in compliance with PIPA.

[45] The complainants and the organization each provided detailed and thoughtful submissions, for which I am grateful.

December 21, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No.: P05-25274

[21] Page 6, initial submission.
[22] Page 10, initial submission.